SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

Term 1969

NO. 891

A. M. COHEN AND WIFE, VERBIE LEE COHEN,
Petitioners,

v.

R. C. BREDEHOEFT, FIRE MARSHAL OF CITY OF HOUSTON; W. O. HUNTER, FIRE CHIEF OF CITY OF HOUSTON; THE CITY OF HOUSTON; AND CRAWFORD MARTIN, ATTORNEY GENERAL OF THE STATE OF TEXAS, *Respondents*

On Appeal From The Judgment Of The United States Court of Appeals, Fifth Circuit

BRIEF FOR THE PETITIONERS

PRESLEY E. WERLEIN, JR.
1350 Esperson Building
Houston, Texas 77002

CHARLES A. EASTERLING
1301 South Coast Building
Houston, Texas 77002
Attorneys for Petitioners

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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BRIEF FOR THE PETITIONERS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions Below

The opinion of the Court of Appeals now being brought before this Court has not yet been reported. It is repro-

duced in Appendix "A" to this Petition. The opinion of the District Court, which the Court of Appeals affirmed (Appendix D, infra, pp. 30-37) is reported at 290 F. Supp. (1968) 1001.

Jurisdiction

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on October 4, 1968, with the Petition for Rehearing denied on October 29, 1968.

The Writ of Certiorari is sought to review the Judgment of the United States Court of Appeals which denied the Petitioners a Permanent Injunction enjoining the City of Houston, Texas, and its officials from enforcing Houston Ordinance Number 8941. Jurisidiction in the District Court was based on 28 U.S.C. Sec. 1343(3). Petitioners' contention is that the City of Houston Ordinance Number 8941 discriminates against Interstate Commerce in violation of Article I, Section 8, Clause 3, and because it violates due process of law as guaranteed by the Fourteenth Amendment. Jurisdiction in this Court is conferred by 28 U.S.C. 1254.

QUESTIONS PRESENTED

The Petitioners are operators of a lawfully authorized and licensed business establishment duly licensed by the State of Texas as a Fireworks Distributor. Petitioners have been issued License No. D-8-66 by the State Fire Marshal of the State of Texas. The business services the Southwestern states of the United States and receives and forwards 40% of its shipments of fireworks in Interstate

Commerce. Such shipments of fireworks, received and stored by Petitioners for distribution in Interstate Commerce, are received and forwarded without breaking the original sealed package. The District Court, in effect, held, by denying the permanent injunction that the mere existence of such packaged product was a common and public nuisance which could be confiscated and destroyed by the City of Houston, Texas, even though the sealed package was traveling in Interstate Commerce. These questions are thus presented:

I

Whether the Due Process Clause and the Equal Protection Clause were violated by the City of Houston in denying Petitioners compensation for the taking of their property without due process of law and preventing their operation of a business duly licensed by the State of Texas.

II

Whether the Due Process Clause and the Equal Protection Clause were violated by the refusal of the District Court to grant Petitioners an injunction enjoining the City of Houston and its officials from confiscating their property as a common and public nuisance when under the laws of the State of Texas:

(A) The City of Houston, Texas, cannot declare a business to be a nuisance which is not a nuisance in fact.

(B) The City of Houston, Texas, cannot prohibit, confiscate and destroy a licensed and lawful product while in shipment in Interstate Commerce under I.C.C. regulations as a sealed package.

III

Whether the Due Process Clause and Equal Protection Clause were violated by the City of Houston when said City annexed Petitioners' land, on which they had been operating their fireworks business for more than thirteen years and were licensed by the State of Texas to operate said business, and under the provisions of an ordinance in effect prior to such annexation, *prohibited* Petitioners from operating said licensed business and threatened the seizure and confiscation without compensation, of Petitioners' inventory of fireworks.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

(1) The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

> AMENDMENT XIV—United States Constitution
> Section 1.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Article I, Section 8, Clause 3, United States Constitution.

ARTICLE I—Section 8, Clause 3

The Congress shall have power:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

(3) Article 1725, Vernon's Annotated Penal Code of Texas; [Pertinent texts set forth in Appendix "E".]

(4) Article 1175, Section 19, Vernon's Annotated Civil Statutes of Texas.

ARTICLE 1175, Section 19

"Each city shall have the power to define all nuisances and prohibit the same within the city and outside the city limits for a distance of 5,000 feet * * *"

(5) Article IV, Section 15-66, Code of Ordinances, City of Houston, Texas. (Sometimes referred to as Ord. No. 8941).

Section 1566:

"The presence of any fireworks within the jurisdiction of the City in violation of this Article is hereby declared to be a common and public nuisance. The Fire Marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this Article and any member of the Fire Prevention Division of the Fire Department of the City, or any police officer of the City, or any other duly constituted peace officer, is empowered to stop the transportation of and detain any fireworks found being transported illegally or to close any building where any fireworks are found stored illegally until the Fire Marshal can be notified in order that such fireworks may be seized and destroyed in accordance with the terms of this section."

STATEMENT OF THE CASE

This is an injunction suit. It was instituted by Petitioners in the United States District Court for the Southern District of Texas to restrain the Fire Marshal of the City of Houston, Texas, and its other officials, from carrying out his threat to summarily confiscate and destroy the property of Petitioners as a common and public nuisance under the purported authority of Ordinance 8941 of the City of Houston. A temporary injunction was issued by said District Court. After a hearing on the merits of the case for a permanent injunction, the said Court denied the Petitioners a permanent injunstion as prayed for in their original petition. The Court of Appeals has affirmed the District Court in denying the permanent injunction.

Petitioners have been engaged in a lawful business at 12514 Gulf Freeway, Houston, Texas, for over thirteen (13) years, doing business as ALPHA ENTERPRISES, INC. This location is approximately sixteen miles from downtown Houston. Such business is lawfully authorized and licensed to engage in business by the State of Texas as a Fireworks Distributor. Petitioners have been issued a License by the State Fire Marshal's Department of the State of Texas, to operate said business, and stands periodic inspections by the State of Texas Fire Marshal. This license is issued under the authority of Article 1725 Vernon's Annotated Penal Code, regulating and permitting the storage of fireworks in the State of Texas.

On November 16, 1965, the City Council of the City of Houston enacted ordinance No. 65-1515 which annexed additional territory adjacent to the territorial limits to the City of Houston including Petitioners' place of business. The property located immediately to the rear of

Petitioner's property was not annexed under such ordinance and is still located in the County of Harris outside of the Houston City Limits.

This business continued to operate without disturbance from the City of Houston from 1953 until on or about the 21st day of March, 1966, when Petitioners received from the Fire Marshal of the City of Houston a letter advising them that the property of the business would be confiscated and destroyed if it were not removed from the premises and from within the territorial limits of the City of Houston. Such letter was written by the Fire Marshal under the purported authority of Article IV, Section 15-66, Code of Ordinances, City of Houston, Texas, which declared the presence of fireworks within the City of Houston a "common and public nuisance."

Petitioners urged in the District Court, by their pleadings and evidence, that their products were in Interstate Commerce and that as a packaged product being shipped in Interstate Commerce they could not be confiscated and destroyed by the Fire Marshal of the City of Houston, Texas, as a common and public nuisance.

Petitioners further urged in the District Court that such action by the City of Houston was a denial of equal protection of the laws and due process of the Constitution of the United States.

Jurisdiction in the District Court was based on 28 U.S.C. Section 1343(3).

STATEMENT, ARGUMENT AND AUTHORITIES

The judgment of the District Court, if allowed to stand, will permit the Fire Marshal of the City of Houston to

summarily confiscate and destroy the property of the Petitioners on the loading docks of railroad companies, motor carrier depots and other carriers wherein packaged fireworks are found within the City of Houston, even though such package fireworks are in Interstate Commerce. This result is clearly not in accordance with the intent of Congress, and is in violation of the Constitution of the United States providing for regulation of Interstate Commerce under the Interstate Commerce Commission. It deprives the Petitioners of their rights to pursue a lawful licensed business operation because of the fact that such packaged products may be confiscated, by the City Fire Marshal, wherever they may be, if their *mere presence* is within the City Limits of the City of Houston.

If the opinion of the Court of Appeals is permitted to stand, Petitioners have thus been deprived of the right afforded them under the Constitution of the United States to receive and forward sealed packages of fireworks in Interstate Commerce, as they are doing in the operation of said business.

All of the evidence in this case shows that the Petitioners have had, at all times since 1958, when fireworks in Texas became a regulated business by the State Legislature, a valid license issued by the State of Texas to store and distribute fireworks as a commodity. The business is legally inspected and approved by the State Fire Marshal's Department of the State of Texas under the laws of the State. The license is issued under the express authority granted by Article 1725, Vernon's Annotated Penal Code, State of Texas, regulating and permitting the storage of fireworks in the State of Texas, with no restriction or limitation to the City of Houston.

Petitioners have thus suffered loss in the following manner, contrary to all authority and law:

(1) The business of Petitioners, shown to have been engaged in Interstate Commerce, has been declared a common and public nuisance without any support in fact or law;

(2) The property of Petitioners will be confiscated and destroyed without benefit of a judicial determination as to whether it was or was not a nusance in fact or law if found in the city limits of the City of Houston, Texas;

(3) The property declared to be a nuisance and subject to being summarily confiscated and destroyed is a business licensed, regulated and authorized by the State of Texas;

(4) The personal property of Petitioners is actually authorized and regulated in its use by Motor Carriers Explosives and Dangerous Articles Tariff II, Interstate Commerce Commission, effective October 3, 1962;

(5) The personal property of Petitioners is further authorized for transportation by The Uniform Highway Act, Vernon's Annotated Civil Statutes, Article 6701d, State of Texas.

The judgment of the Court of Appeals thus approves an ordinance which violates the Fourteenth Amendment to the Constitution of the United States and denies to Petitioners the equal protection of the laws as well as taking the Petitioners' property without due process. *Chicago B. & Q. R. Co. v. Illinois,* 200 U.S. 561, 50 L.Ed. 596, 26 S.Ct. 341.

This exact ordinance in another Texas city was declared to discriminate against Interstate Commerce and to impede

its movement in regular course and thus was in conflict with the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, City of Fort Worth v. Atlas Enterprises, 311 S.W.2d 922 (Fort Worth Court of Civil Appeals, 1958). Therein the Court said:

> "Furthermore, since the ordinance discriminates against interstate commerce, will impede its movement in regular course, and will affect it directly, it is in conflict with the commerce clause of the United States Constitution, art. 1, Section 8, cl. 3. Title 18 U.S.C.A., Ch. 39, Section 835, exhibits congressional delegation of authority to the Interstate Commerce Commission to regulate and control the transportation within the limits of the United States of explosives and combustibles. Fireworks are of this character. Regulations of the Interstate Commerce Commission have been promulgated pursuant to authority so conferred. The regulations are before us."

Moreover, the ordinance was shown to be in conflict with the laws of the State of Texas. On this point, the Court said:

> "The ordinance is in conflict with the laws of the State of Texas. The Legislature was prohibited from passing any local or special law authorizing the regulation of trade. Const. Art. 3, sec. 56, Vernon's Ann. St. The Uniform Highway Act, Vernon's Ann. Civ. St. Art. 6701d, relates to the transportation of explosives on state highways. Section 139 thereof provides for the marking of vehicles carrying explosives and authorizes the Director of Public Safety and the Railroad Commission of Texas to issue regulations on that subject and regulations have been issued. Said article provides that the Act shall apply in all political subdivisions and municipalities, and limits the powers which may be exercised by local

> authority in respect to streets and highways through enumeration of those which may be so exercised."

The Court further stated the principle of law regulating the lawful exercise of the police power of a municipality in its lawful authority. On this point, the Court said:

> "Lawful exercise of the police power of a municipality may not be contrary to the State or the Federal Constitution or the governmental powers created thereby, because the legitimate scope of the municipal police power ends where constitutional inhibitions begin. 37 Am. Jur., p. 920, "Municipal Corporations," sec. 285, "Constitutional Limitations." A business authorized or regulated by state statute cannot be prohibited by city ordinance, and ordinances which are in conflict therewith on the same subject are necessarily void. Murphy v. Wright, Tex. Civ. App., Fort Worth 1938, 115 S.W.2d 448. Transportation of commodities incident to transactions regulated by Federal law under Constitutional control cannot be prohibited by a state or its subdivisions. Actiesselskabet Ingrid v. Central R. Co. of New Jersey, 2 Cir. 1914, 216 F. 72, L.R.A. 1916B, 716; Watson Bros. Transportation Co. v. City of Omaha, D.C. Neb. 1955, 132 F. Supp. 6. Both are cases upon explosives. See annotated cases having analogy in 47 Amer. St. Rep., beginning at page 536."

It is well established that the Constitution of the United States protects Interstate Commerce against substantial burdens or obstructions, regardless of their source. *Whitmore v. Bureau of Revenue of State of New Mexico,* 64 F. Supp. 911, affirmed 67 S.Ct., 329 U.S. 668.

There is no question but that Petitioners are entitled to receive fireworks shipped to them from other states within the United States, and from foreign countries to

Houston, Texas. The State of Texas has specifically authorized the sale, storage, transportation and use of fireworks within the State of Texas. *Article 1725* Vernon's Annotated Penal Code, State of Texas. Therefore, fireworks are not that class of property made unlawful through its presence and possession in the State of Texas.

However, under the ordinance of the City of Houston, Texas, of which Petitioners make complaint as being unconstitutional and a direct burden upon Interstate Commerce, the mere presence of fireworks within the city limits of the City of Houston is declared to be a common and public nuisance. Moreover, the Fire Marshal is instructed to confiscate and destroy such fireworks found to be present within the City of Houston. Clearly, such ordinance, making the mere presence of fireworks a nuisance and authorizing their destruction does not exclude fireworks transportation, or storage in Interstate Commerce free from seizure, and destruction. Consequently, Petitioners' property is subjected to being confiscated and summarily destroyed by the Fire Marshal of the City of Houston as a common and public nuisance. This is also true, although such product is in the process of being shipped in Interstate Commerce, or being stored temporarily for delivery in Interstate Commerce. Forty percent of Petitioners' business is the shipment in Interstate Commerce of the products received from other states within the United States or from foreign countries.

In the case of *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 2 Cir. 1914, 216 F. 72, L.R.A. 1916B 716, the Court held that the transportation of commodities incident to transaction regulated by the federal law under Constitutional control cannot be prohibited by a state or

its subdivisions. The same rule was applied in *Watson Bros. Transportation Co. v. City of Omaha,* D.C. Neb., 1955, 132 F. Supp. 6. These cases involved identically the same commodities as the fireworks are in this case, and the same ruling is applicable to this case.

The ordinance relied upon by Respondents as authority to confiscate and destroy Petitioners' property was enacted by the City of Houston as Ordinance No. 8941 on the 24th day of June, 1953, now codified as Section 15-66, Code of Ordinances, City of Houston, Texas. Its passage was more than five (5) years *prior* to the enctment of Article 1725, Vernon's Annotated Penal Code, authorizing fireworks in the State of Texas. Section 15-66 reads as follows in pertinent parts:

> *"The presence of any fireworks within the jurisdiction of the City in violation of this Article is hereby declared to be a common and public nuisance.* The Fire Marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisdiction in violation of this Article and any member of the Fire Prevention Division of the Fire Department of the City, or any police officer of the City, or any other duly constituted peace officer, is empowered to stop the transportation of and detain any fireworks found being transported illegally or to close any building where any fireworks are found stored illegally until the Fire Marshal can be notified in order that such fireworks may be seized and destroyed in accordance with the terms of this section." (Emphasis added).

It is noted that nowhere in the ordinance is there any finding or reason for the declaration, but merely a statement that their presence is a nuisance.

This section has not been amended or changed since the enactment of *Article 1725* of the Penal Code of Texas in 1958.

Article 1725, Penal Code, was enacted by the Legislature to become effective February 1, 1958. Article 1725 V.A.C.S. regulates the sale, storage and transportation of fireworks within the State of Texas.

The enactment of Article 1725, Penal Code specifically authorizes the presence of fireworks in the State of Texas and therefore pre-empted other cities within the State of Texas from enacting legislation in conflict with the terms and provisions set forth therein.

The enactment of Article 1725, Penal Code, conclusively demonstrated that fireworks meeting the requirements of the statute, as evidenced by the granting of a license, could not be a *common and public* nuisance.

With these facts in mind, we find the ordinance of the City of Houston declaring, without any support of facts, *that the presence of fireworks is a common and public nuisance.* On the other hand, fireworks are licensed and authorized as a commodity for public display and sale by the State Statute. The conflict becomes apparent under the comparison, and Article 1725 shall prevail and the ordinance must fall as being in conflict therewith. The law is settled that a city cannot declare that to be a nuisance which is not a nuisance in fact.

In *Crossman v. City of Galveston,* 247 S.W. 810 (Supp. Ct. Tex.), the Court said:

> "* * * Not having express statutory sanction for the ordinance, the city was without authority to declare any dilapidated building a nuisance unless it

> was so in fact. The rule is that, in the absence of express legislative sanction, a city is without authority to declare that a nuisance which is not so per se or at common law. Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608; Spann v. City of Dallas, 235 S.W. 513, 514, 19 A.L.R. 1387; People v. City of Chicago 261 Ill. 16, 103 N.E. 609, 49 L.R.A. (N.S.) 438, 442, Ann. Cas. 1915A 292, Allison v. City of Richmond, 51 Mo. App. 133; Shreveport v. Leiderkrantz Society, 130 La. 803, 58 So. 578, 40 L.R.A. (N.S.) 75, 79; 20 R.C.L. pp. 389, 390, 414, 431, and notes; Dillon on Municipal Corp. (5th Ed.) Sec. 684."

In *City of Carthage v. Allums,* (Tyler Court of Civil Appeals 1966), 398 S.W.2d 799, the Court temporarily enjoined the City of Carthage Building Inspector from ordering the discontinuance of the operation of a slaughterhouse by Allums which had been in existence for over ten (10) years. *The City had sought to prohibit the operation pursuant to an ordinance passed by the City declaring the operation of a slaughterhouse to be a nuisance.* The Appellate Court sustained the temporary injunction and said:

> "(11) It seems to be universally accepted that a municipal corporation which is empowered to declare what shall be a nuisance is not thereby authorized to declare that to be a nuisance which is not so in fact. Things which may or may not be nuisances when their character in this respect depends upon circumstances cannot be so declared in advance. McQuillian on Municipal Corporations, Vol. 7, Section 24.66, citing cases.
>
> "The Supreme Court of this State in the case of City of Texarkana v. Reagan, 112 Tex. 317, 247 S.W. 816, stated the rule as follows:

> "'* * * neither the Legislature nor the city council can by a declaration make that a nuisance which is not in fact a nuisance; and the question as to whether or not the building here involved was a nuisance was a justifiable question, determinable alone by the court or jury trying the case. * * *'
>
> "(12) The ordinance makes final the determination of the city council on the question as to whether or not the slaughterhouse is a nuisance. This the city council was without authority to do and the ordinance therefore, insofar as it makes final the orders of the city council declaring the same to be a nuisance and ordering its summary abatement, is void."

In *Hill v. Villareal,* 383 S.W.2d 463, (San Antonio C.C.A. 1964), suit was brought to declare a rendering plant in the City of San Antonio a public nuisance by the City of San Antonio. Again the law of the *Crossman* case was applied, and the Court said:

> "* * * It is settled law that although a home rule city is given statutory power to define and declare a nuisance, the determination of whether or not something which is not a nuisance at common law or per se is in fact so, is a justifiable question for a court of competent jurisdiction. Crossman v. City of Galveston, 112 Tex. 303, 247 S.W. 810 (1923)."

In *State v. Thomason,* 378 P2d 441, 61 Wash. 2d 425, the Court held that in absence of facts establishing nuisances or circumstances showing conditions substantially detrimental to public health, safety, morals or welfare, zoning ordinances which attempted to immediately abolish existing nonconforming uses are unconstitutional insofar as they deprive individuals of vested rights without due

process of law. Petitioners find themselves in this exact position. One day he operates a lawful licensed business establishment under regulation and license by the State of Texas and on the next day finds that his property has been declared a common and public nuisance about to be summarily confiscated and destroyed. Needless to say, such destruction will be without any compensation whatever from the City of Houston.

AUTHORITY OF THE CITY OF HOUSTON, TEXAS, TO PROHIBIT THE KEEPING OR STORING OF FIREWORKS WITHIN ITS TERRITORIAL LIMITS *VERSUS* AUTHORITY OF THE CITY OF HOUSTON TO DECLARE THE PRESENCE OF FIREWORKS WITHIN ITS TERRITORIAL LIMITS A COMMON AND PUBLIC NUISANCE SUBJECT TO CONFISCATION AND DESTRUCTION.

The Petitioners seriously contend that there is a great difference between the authority of a city to *regulate* and *prohibit* the keeping and storing of fireworks within its territorial limits as distinguished from its authority to *declare* the *presence* of fireworks within its territorial limits a common and public nuisance subject to confiscation and destruction. The authority to prohibit the storing of fireworks must be necessarily gained from its police power and must relate directly to the health, life and safety of its citizens. The exercise of prohibition or regulation of its police power must be reasonable and appropriate to the accomplishment sought in the legislation. Any such legislation would therefore be subject to judicial review by the judiciary system. Such tests would be made in light of whether or not the Ordinance was reasonable or unreasonable.

The Ordinance challenged by the Petitioners neither regulates nor prohibits the keeping and storing of fireworks but simply declares fireworks to be a common and public nuisance and makes them the object of confiscation and destruction. Thus, Petitioners are left with absolutely no right of judicial determination as to whether or not they are a nuisance. It is only after the fireworks have been seized and destroyed that any remedy becomes available to the Petitioners. Needless to say, the Petitioners are in a helpless position attempting to know whether or not their fireworks will be confiscated and destroyed while in shipment in Interstate Commerce on the loading docks, wharves, or depots. Such remedy comes too late after the fireworks have been destroyed.

It is significant to note that Article 1725, Vernon's Annotated Penal Code was enacted in 1958 regulating all phases of the sale, storage and transportation of fireworks in the State of Texas. All of the cases cited by the District Court in its Memorandum Opinion failed to recognize the distinction between *regulation* and *prohibition* as distinguished from *seizure* and *confiscation* as a nuisance. After the enactment of Article 1725, supra, confiscation and seizure was no longer authorized. Moreover, all of the cases cited by the District Court were decided by the Appellate Courts of Texas prior to the Year 1958 when Article 1725 became effective. They, therefore, are no longer applicable to a licensed commodity in Interstate Commerce.

Threadgill v. State, 275 S.W.2d 658, was decided in the year 1954. *Stouten v. City of Fort Worth,* 277 S.W.2d 150, was decided in 1955. *Cannon v. City of Dallas,* 263 S.W.2d 288, was decided in 1953. *Ex parte Clark,* 140 S.W.2d 854, was decided in 1940. *City of Fort Worth v.*

Atlas Enterprises, 311 S.W.2d 922, was decided in 1958, but prior to the effective date of the statutes. Consequently, all such cases are no longer controlling or applicable to this case. Moreover, since the enactment by the Legislature of the State of Texas of Article 1725, Penal Code, regulating and authorizing fireworks, no fireworks of any dangerous size may be sold within the State of Texas. Article 1725 has limited fireworks, as to size and capacity, to make them safe in the hands of children above the age of ten (10) years. It is, therefore, submitted that a commodity or product which is authorized in the hands of a ten (10) year old child by a statute of the State of Texas cannot be a common and public nuisance.

To support the Judgment, there has been a reliance upon cases wherein the subject matter of the Ordinance was merely *regulated* and not the object of *seizure and destruction.* Therefore, all of the case authority cited does not really reach the complaint made by Petitioners:

Breard v. City of Alexandria, 341 U.S. 622, 633-637, (1951) was *regulation* of "door-to-door solicitation on private property of others, punishment made a misdemeanor"; *Southern Pacific Company v. Arizona,* 325 U.S. 761, 766-768 (1945) (*regulates* number of passenger cars and freight cars on trains, makes punishment money recovery); *Parker v. Brown,* 317 U.S. 341, 360 (1943) (*regulation* of pro rate program for the 1940 raisin crop); *Hood & Sons v. Dumond,* 336 U.S. 525 (1949) (*regulation* of additional milk facilities to existing milk facilities); *California v. Zook,* 336 U.S. 725, 728 (1940) (*regulation* by license issued from the State Interstate Commerce Commission); *Standard Oil Company v. Marysville,* 279 U.S. 582 (1929) (*regulation* of depth of storage tanks beneath ground, fine imposed as misdemeanor); *Pierce Oil Corporation v. Hope,* 248 U.S. 498 (1919) (*regula-*

tion of distance within which storage tanks could be placed.)

In this case, Petitioners are not complaining of a requirement by the City that their business establishment must comply with any license requirement, distance requirement, convenience and necessity requirement, nor number of business establishments to be operated by them. Their complaint is that their product, otherwise licensed, validated, and regulated by the State of Texas is subject to being confiscated and destroyed while in shipment in Interstate Commerce by the City of Houston. Petitioners have been told by the Fire Marshall of the City of Houston, in writing, that their property will be conficated and destroyed. This fact remains true whether or not Petitioners move their business just outside the city limits of the City of Houston, in Harris County, Texas, or some county removed from the City of Houston but adjacent thereto. The presence of the fireworks on the loading docks and depots of public carriers within the City still subject Petitioners fireworks to seizure, confiscation and destruction. Moreover, this would be without any notice whatsoever to Petitioners that their property was being seized and destroyed. Without notice, no action could be taken by the Petitioners to forestall the seizure and destruction of an otherwise licensed and authorized commodity.

THE CITY OF HOUSTON PERMITS BY ORDINANCE OTHER PRODUCTS FAR MORE DANGEROUS AND EXPLOSIVE THAN THE PACKAGE OF FIREWORKS SHIPPED IN INTERSTATE COMMERCE AND PROPERLY LABLED UNDER ICC REGULATIONS.

Evidence in the Court below revealed that the city of Houston, through its regulatory ordinances, permits to be

sold, stored and transported other explosives within the City of Houston, to-wit, gun powder, dynamite, perforating guns, black powder, shotgun shells, blasting powder, blasting caps, and rocket propellants. It is undisputed that all of these products are highly explosive. Yet, the City of Houston regulates and allows these products to be sold, stored and transported within the City of Houston, while at the same time, declares fireworks to be a common and public nuisance subject to confiscation and destruction without notice. It is Petitioners' contention that such action by the City of Houston denies them due process of law as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution.

THE CITY OF HOUSTON PERMITS NON-CONFORMING USES BY ORDINANCES PASSED AFTER ANNEXATION OF ADDITIONAL TERRITORIES, BUT HAS REFUSED TO PERMIT FIREWORKS BUSINESS AS A NON-CONFORMING USE.

In addition to the discrimination against Petitioners' possession of one type of explosive and not against all explosives, may we point out to the Court that the City of Houston has in other ordinances passed by the City Council allowed non-conforming uses to continue existing at the time of the passage of the ordinance. The same practice has been utilized in annexation ordinances which violate existing ordinances. Examples of such ordinances allowing non-conforming uses are the dog kennels, cemeteries, restriction on real property, slaughterhouses, and sale of beer within certain distances of businesses.

This action by the City of Houston further denies Appellants due process of law as guaranteed by Section 1

of the Fourteenth Amendment to the United States Constitution.

COMPARISON OF CONDITIONS MADE THE BASIS OF THE PASSAGE OF ORDINANCE 8941 BY THE CITY OF HOUSTON IN 1953 AND CONDITIONS AFTER THE ENACTMENT OF ARTICLE 1725, PENAL CODE OF TEXAS.

The Court below has erroneously based its opinion upon the occurrence in the City of Houston in 1953 of an explosion. Such explosion occurred at the time when fireworks were unregulated and not supervised by the State of Texas. Such fact has absolutely no relationship to the present existing conditions under the State law of the State of Texas which authorizes Petitioners to engage in the sale and storage of fireworks within the State of Texas. Conditions existing in 1953 which caused the explosion have been expressly removed by the provisions made in regulation of fireworks by Article 1725. Under the regulations of Article 1725, dangerous fireworks have been eliminated and their storage made safe. It is to be noted in the statute that distance requirements are made which fully protect any and all surrounding buildings or persons within the area where fireworks are stored. Prior to the enactment of the statute, fireworks were unregulated, unsupervised, and left free to be manufactured and developed unbridled by any municipal or state authority. Thus, the fireworks were manufactured, sold and distributed in accordance with the principles of supply and demand at the cheapest price. However, all of these impediments were removed by the enactment of Article 1725, Penal Code of Texas, and no longer exists so as to pose a threat of explosion.

There has not been cited, one single case, nor can there be, wherein any Court has upheld an Ordinance of a city which declares a product to be a common and public nuisance where such product is licensed, regulated and inspected by the state through its legislative enactments.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for each of the foregoing reasons, the Petitioners pray this Honorable Court that a Writ of Certiorari be granted, and the Judgment of the Court of Appeals be reversed and this Honorable Court grant a permanent injunction against the City of Houston, and its officials, enjoining the Respondent from enforcing an invalid and void Ordinance which violates Petitioners' Constitutional rights.

Respectfully submitted,

PRESLEY E. WERLEIN, JR.
1350 Esperson Building
Houston, Texas 77002

CHARLES A. EASTERLING
1301 South Coast Building
Houston, Texas 77002
Attorneys for Petitioners

APPENDIX 'A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26076

A. M. COHEN and Wife,
VERBIE LEE COHEN,

Appellants,

versus

R. C. BREDEHOEFT, Fire Marshal
of City of Houston, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(October 4, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: Appellants are engaged in the wholesale fireworks business in the City of Houston. The business entails the maintenance of warehouses where fireworks are stored. An ordinance of the City prohibits such

storage. Appellants contend that the ordinance is violative of the commerce clause of the federal Constitution, Art. 1, §8, Cl. 3, and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution.

The state questions asserted were fully answered, adversely to appellants, in the state courts. *Alpha Enterprises, Inc. v. City of Houston*, 411 S.W.2d 417 (Tex. Civ. App., Houston 1967), error ref. n.r.e., cert. denied, 389 U.S. 1005 (1967). The federal questions presented were the subject matter of a memorandum opinion of the district court and were found to be without merit. *Cohen v. Bredehoeft, Fire Marshal*, S.D. Tex., 1968,____ F. Supp.____. We agree that the complaint is without redeeming merit. The district court did not err in denying the relief sought.

AFFIRMED.

APPENDIX "B"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26076

D. C. Docket No. CA 67-H-975

A. M. COHEN and Wife, VERBIE LEE COHEN,
Appellants,

versus

R. C. BREDEHOEFT, Fire Marshal
of City of Houston, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, A. M. Cohen and Wife, Verbie Lee Cohen, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

October 4, 1968

Issued as Mandate:

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26076

A. M. COHEN and Wife,
VERBIE LEE COHEN,

Appellants,

versus

R. C. BREDEHOEFT, Fire Marshal
of City of Houston, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(October 29, 1968)

(On Petition for Rehearing)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby

DENIED.

APPENDIX "D"

COURT'S MEMORANDUM OPINION

(Filed March 22, 1968)

(Caption Omitted)

I.

The Plaintiffs, A. M. Cohen and wife, Verbie Lee Cohen, seek by this action to have the Defendants permanently enjoined from enforcing Houston Ordinance No. 8941. The Plaintiffs contend that the ordinance is unconstitutional in that it discriminates against Interstate Commerce in violation of Art. I, Sec. 8, Cl. 3 and because it violates Due Process of Law of guaranteed by the Fourteenth Amendment. Jurisidiction is based on 28 U.S.C. Sec. 1343(3). See also *City of Houston v. Jas. K. Dobbs Co.*, 232 F.2d 428 (5th C.A. 1956).

The Plaintiffs are the sole owners of Alpha Enterprises, Inc. Alpha Enterprises is engaged exclusively in the wholesale fireworks business. In connection with this business it maintains several warehouses where fireworks are stored on premises owned by the Plaintiffs and located within the city limits of the City of Houston. Fireworks manufactured in other states and in foreign nations are purchased by the Plaintiffs and are shipped in Interstate Commerce to the Plaintiffs' place of business where they are stored for varying amounts of time. The fireworks are then resold in their original packages to purchasers within and without the State of Texas. The Plaintiffs sell approximately forty percent of their fireworks outside of Texas. Alpha Enterprises is a licensed distributor of fireworks under the provisions of Art. 1725, Texas Penal Code.

Named as Defendants in this proceeding are the City of Houston, its Fire Marshal, R. C. Bredehoeft, its Fire Chief, W. O. Hunter, and Crawford Martin, Attorney General of the State of Texas.

The City of Houston is a Home Rule City which is empowered by Art. 1068(7), V.A.T.S., to prohibit the keeping of buildings for the storing of gun powder and other combustible explosive or dangerous materials. *Alpha Enterprises, Inc. v. City of Houston,* 411 S.W.2d 417 (Tex. Civ. App., Houston 1967, writ ref'd n.r.e.), cert. denied, 389 U.S. 1005 (1967). Pursuant to this authorization, the City of Houston passed on June 24, 1953, the ordinance being attacked in this proceeding. The pertinent section of Ordinance No. 8941 provides, in part, as follows:

> "The presence of any fireworks within the jurisdiction of the City in violation of this Article is hereby declared to be a common and public nuisance. The Fire Marshal is directed and required to seize and cause to be safely destroyed any fireworks found within the jurisidiction in violation of this Article and any member of the Fire Prevention Division of the Fire Department of the City or any Police Officer of the City or any other duly constituted Peace Officer is empowered to stop the transportation of and detain any fireworks found being transported illegally or close to any building where any fireworks are found stored illegally until the Fire Marshal can be notified in order that such fireworks may be seized and destroyed in accordance with the terms of this section."

The circumstances leading to the passage of Ordinance No. 8941 are relevant to this proceeding. On June 5, 1953, there was a fire and explosion on the premises of

the Alco Fireworks and Specialty Company. As a result of this fire, four people were killed, including two children, and ninety-six were injured. The owner of the Alco Fireworks and Specialty Company was the same A. M. Cohen who is a Plaintiff in the case now before the Court. Nineteen days after the disastrous fire and as a direct consequence of it, Ordinance No. 8941 was passed by the City Council.

II.

The Plaintiffs assert that enforcement of Ordinance No. 8941 should be permanently enjoined because the Ordinance imposes an Unconstitutional burden on Interstate Commerce.

Numerous Supreme Court decisions have made it clear that the commerce clause does not, by itself, exclude the States from legislating on matters relating to the health, life and safety of their citizens even though such legislation might indirectly affect Interstate Commerce. *Head v. New Mexico Board,* 374 U.S. 424 (1963); *Huron Cement Co. v. Detroit,* 362 U.S. 440 (1960). In the exercise of its police power, a State and its political subdivisions may enact legislation reasonably appropriate to the accomplishment of legitimate ends provided that such legislation does not conflict directly with an act of Congress and further provided that the matter regulated, because of its essentially local nature, has not been preempted from State action. *Breard v. Alexandria,* 341 U.S. 622, 633-637 (1951); *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 766-768 (1945). This is true though the exercise of the police power may materially affect Interstate Commerce. *Parker v. Brown,* 317 U.S. 341, 360 (1943). One additional significant limitation on a State's police power is

that it may not be used for the purpose of promoting its own local economic advantages. *Hood & Sons v. Dumond*, 336 U.S. 525 (1949).

Applying the foregoing general principles to the facts of the instant case, the ultimate question is whether the State's interest is outweighed by a National interest in the unhampered Interstate Commerce in fireworks. *California v. Zook*, 336 U.S. 725, 728 (1949). The answer must be in the negative.

Houston's tragic experience with fireworks explosions clearly demonstrated the need and reasonableness of an ordinance of the type now being challenged. The ordinance treats all fireworks distributors, whether local or foreign, equally and its effect on Interstate Commerce is incidental to its primary purpose of protecting the public. Under the circumstances, Ordinance No. 8941 cannot be said to impose an undue burden on Interstate Commerce. *Standard Oil Co. v. Marysville*, 279 U.S. 582 (1929); *Pierce Oil Corp. v. Hope*, 248 U.S. 498 (1919).

City of Fort Worth v. Atlas Enterprises, 311 S.W.2d 922 (Tex. Civ. App., Fort Worth 1958, writ ref'd, n.r.e.), is heavily relied on by the Plaintiffs. The case is distinguishable on two grounds. First, the Court was concerned solely with the validity of a prohibition against the *transportation* of fireworks within the City (311 S.W.2d at 925). Compare *Parker v. City of Fort Worth*, 281 S.W.2d 721 (Tex. Civ. App., Fort Worth 1955, no writ), and *Stoughton v. City of Fort Worth*, 277 S.W.2d 150 (Tex. Civ. App., Fort Worth 1955, no writ). Second, and more important, in the *Atlas* case, supra, the City produced no evidence of any injury resulting from the presence of fireworks within the City (311 S.W.2d at 925). In the

case at bar, in contrast, there is more than ample evidence of the dangers presented by the Plaintiffs' fireworks business.

Certain Federal statutes and regulations prescribe rules governing transportation, packaging and labeling of fireworks shipped in Interstate Commerce.[1] A careful examination of these provisions convinces me that there is no conflict between Ordinance No. 8941 and the Federal statutes and regulations. See *Double-Eagle Lubricants, Inc. v. State of Texas,* 248 F. Supp. 515 (N.D. Tex. 1965), appeal dismissed, 384 U.S. 434 (1966). Moreover, there is no reason to suppose that Congress intended to preempt the States from legislating in this area. On the contrary, 18 U.S.C. Sec. 836 indicates an intent to encourage State legislation regulating fireworks.[2] The requirement that congressional intent to displace local laws must be clearly manifested is obviously not satisfied in this case. *California v. Zook,* 336 U.S. 725, 733 (1949).

III.

The Plaintiffs also attack Ordinance No. 8941 on the grounds that it denies them Due Process of Law as guaranteed by Section 1 of the Fourteenth Amendment of the

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1. 15 U.S.C. Sec. 1261(Q)(1); 46 U.S.C. Sec. 170; 18 U.S.C. Sec. 836; 49 C.F.R. Sec. 73.108.

2. 18 U.S.C. Sec. 836 provides, in part, as follows:
"Whoever, otherwise than in the course of continuous interstate transportation through any state, transports fireworks into any state, or delivers them for transportation into any state, or attempts so to do, knowing that such fireworks are to be delivered, possessed, stored, transshipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such state specifically prohibiting or regulating the use of fireworks, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

United States Constitution. Specifically, the Plaintiffs assert that the Ordinance discriminates unduly by declaring fireworks to be a public nuisance while making no provision for other dangerous explosives such as dynamite, perforating guns, etc. Plaintiffs further argue that the Ordinance is discriminatory in that it does not allow for the continuation of non-conforming uses existing at the time the Ordinance became applicable. In support of this argument, the Plaintiffs introduced into evidence a myriad of Houston Ordinances permitting such non-conforming uses.

An exercise by the State of its police power is presumed to be valid when it is challenged under the Due Process Clause. *Bibb v. Navajo Freight Lines,* 359 U.S. 520, 529 (1959). A party attacking an ordinance on this basis has the burden of establishing its invalidity beyond reasonable doubt. *Standard Oil Co. v. City of Gadsden,* 263 F. Supp. 502 (N.D. Ala. 1967). Questions involving the reasonableness, wisdom and propriety of such ordinances are not for the determination of the Courts, but for the legislature. *Standard Oil Co. v. Marysville,* 279 U.S. 582, 584 (1929).

The classic test of the validity of an exercise of the police power under the Due Process Clause is stated in the following manner:

> "To justify the State in interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Goldblatt v. Hempstead,* 369 U.S. 590, 594-595 (1962).

I find that the Plaintiffs have failed to establish the invalidity of Ordinance No. 8941 under the test set out

in the *Goldblatt* case, supra. The 1953 explosion and fire at the Alco Fireworks and Specialty Company is clear evidence of the need for legislation regulating the storage of fireworks. Moreover, Ordinance No. 8941 represents a reasonably appropriate means of protecting the citizens of Houston from future holocausts caused by fireworks. This determination is amply supported by Texas cases dealing with similar ordinances.[3]

The fact that the City has chosen to regulate fireworks and not other types of dangerous explosives does not violate due process. The rule is succinctly stated in *Hughes v. Superior Court*, 339 U.S. 460, 468 (1950), where the Supreme Court wrote:

> "A State may 'Direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.' "

Likewise, I consider it improper for me to rule on the wisdom of the City's refusal to make a provision for the continuation of non-conforming uses existing at the time the Ordinance became applicable. This is a matter for the City Council. *Standard Oil Co. v. Marysville*, 279 U.S. 582, 584 (1929).

I THEREFORE HOLD that Ordinance No. 8941 is not violative of Due Process as guaranteed by the Fourteenth Amendment.

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3. Treadgill v. State, 275 S.W.2d 658 (Tex. Crim. App. 1954); Ex Parte Clark, 140 S.W.2d 854 (Tex. Crim. App. 1940); Parker v. City of Fort Worth, 281 S.W.2d 721 (Tex. Civ. App.), Fort Worth 1955, no writ); Stoughton v. City of Fort Worth, 277 S.W.2d 150 (Tex. Civ. App., Fort Worth 1955, no wrt); Cannon v. City of Dallas, 263 S.W.2d 288 (Tex. Civ. App., El Paso 1953, writ ref'd. n.r.e.).

IV.

Finally, the Plaintiffs attack Ordinance No. 8941 on the grounds that it conflicts with Art. 1725, Texas Penal Code, and is thus void. This contention is without merit for two reasons. First, the same argument was made in the State Court and it was rejected in a suit involving the same parties as are now before this Court. *Alpha Enterprises, Inc. v. City of Houston,* 411 S.W.2d 417 (Tex. Civ. App., Houston 1967, writ ref'd, n.r.e.), cert. denied, 389 U.S. 1005 (1967). Second, this argument is expressly foreclosed by the terms of Section 14 of Art. 1725, supra.[4]

V.

TO CONCLUDE, I find Ordinance No. 8941 to be without constitutional infirmity. I further find that a permanent injunction should be denied.

The Clerk will notify Counsel to draft and submit an appropriate decree.

/s/ JOE INGRAHAM

United States District Judge

4. Section 14 of Art. 1725, V.A.T.S., provides, in part, as follows: "Provided, however, that nothing herein shall be construed to limit or restrict the powers of cities, towns or villages as defined and delegated by ordinances prohibiting or imposing further regulations on fireworks; and provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above mentioned title shall remain in full force and effect until thereafter amended by such city."

APPENDIX "E"

Article 1725 Vernon's Annotated Penal Code of Texas.

PENAL CODE

Art. 1725. Regulation and offenses as to fireworks.

Definitions

Section 1. As used in this Act the following terms, unless otherwise clearly indicated by the context, shall have the meanings specified below:

"ICC-Class C Common Fireworks"—Those fireworks specifically defined in Section 2 of this Act and not otherwise;

"Manufacturer" — Persons, firms, corporations or association that are engaged in the making of fireworks;

"Distributor"—Those who sell fireworks to retailers or to jobbers for resale to others;

"Jobbers"—Those who purchase fireworks for resale to retailers only;

"Retailers"—Those who purchase fireworks for resale to consumers only;

"Chief Fire Prevention Officer"—The chief of the fire department, if in a city that has a fire chief, or if in the county, the chief fire enforcement officer primarily responsible in the county for the enforcement of fire prevention acts whether same be the sheriff, the constable or any other local enforcement officer;

"Public Display" — The igniting and shooting of fireworks for public amusement for a fee;

"State Fire Marshal"—The chief law enforcement officer of the State of Texas charged with the responsibility of fire prevention;

"Importer"—Those who import fireworks from a foreign country for sale to distributors, jobbers or retailers within the State of Texas;

"Salesmen"—An individual employed by a factory, distributor or jobber who takes orders for fireworks from distributors, jobbers or retailers;

"Class A Fireworks"—Those fireworks defined in Section 10 of this Act and not otherwise;

"Class B Fireworks"—Shall include all types of dangerous fireworks excepting fireworks designated as ICC Class C Common Fireworks and Class A Fireworks.

Possession for sale or sale; permissible fireworks

Sec. 2. It shall be unlawful for any individual, firm, partnership, corporation or association to possess for sale within the state, sell or offer for sale, at retail, or use, within the State of Texas, any fireworks other than the permissible fireworks herein enumerated.

Permissible fireworks, as that term is used in this Act, shall be understood to mean ICC Class C Common Fireworks only and shall include only those fireworks enumerated as ICC Class C Common Fireworks in the regulations of the Interstate Commerce Commission, as said regulations are presently constructed, for the transportation of explosives and other dangerous articles and, more specifically, shall include and be limited to the following:

(1) Roman Candles, total pyrotechnic composition not to exceed twenty grams each in weight.(10 ball);

(2) Sky Rockets, with sticks, total pyrotechnic composition not to exceed twenty grams each in weight (6 oz.). The rocket sticks must be securely fastened to the casing;

(3) Helicopter Type Rockets, total pyrotechnic composition not to exceed twenty grams each in weight;

(4) Cylindrical Fountains, total pyrotechnic composition not to exceed seventy-five grams each in weight. The inside tube diameter shall not exceed ¾ inch;

(5) Cone Foundations, total pyrotechnic composition not to exceed fifty grams each in weight;

(6) Wheels, total pyrotechnic composition not to exceed sixty grams in weight, for each driver unit, but there may be any number of drivers on any one wheel. The inside bore of driver tubes shall not be over ½ inch;

(7) Illuminating Torches and Colored Fire in any Form, total pyrotechnic composition not to exceed one hundred grams each in weight;

(8) Sparklers and Dipped Sticks, total pyrotechnic composition not to exceed one hundred grams each in weight. Pyrotechnic composition containing any chlorate shall not exceed five grams;

(9) Mines and Shells, of which the mortar is an integral part, except those designed to produce an audible effect, total pyrotechnic composition not to exceed forty grams each in weight;

(10) Firecrackers and Salutes, with casings, the external dimensions of which do not exceed one and one-half inches in length or one quarter inch in diameter, total pyrotechnic composition not to exceed two grains each in weight;

(11) Whistles without Report, total pyrotechnic composition not to exceed forty grams each in weight.

(12) Railway fuses, other fireworks used by railroads or other transportation agencies for signal purposes or illumination, truck flares, hand ship distress

signals and illuminating torches. Total pyrotechnic composition of illuminating torches not to exceed one hundred grams each in weight;

(13) Items composed of combination of two or more articles or devises of the above enumerated approved items.

Retail sales prohibited; exceptions

Sec. 3. Be it further enacted, that no permissible articles of ICC Class C Common Fireworks enumerated in Section 2 shall be sold at retail, offered for sale at retail, or possessed for retail sale within the state, or used, in the State of Texas, unless same shall be properly identified to conform to the nomenclature of Section 2 hereof and unless it is certified as "ICC Class C Common Fireworks" on all shipping cases and by imprinting on the article or retail container, "ICC Class C Common Fireworks," with the exception of whistles without report, such imprint to be of sufficient size and placement as to be readily recognized by law enforcement authorities and the general public. Each manufacturer shall submit samples of all items to the State Fire Marshal for approval.

Exceptions from act

Sec. 4. Be it further enacted, that there shall not be affected by this Act the following:

Toy pistols, toy canes, toy guns or similar devices in which paper caps containing twenty-five one-hundredths (25/100ths) grains or less of explosive compounds are used, provided they are so constructed that the hand cannot come in contact with the cap when in place for exploding, and toy paper pistol caps which contain less than twenty-five one-hundredths (25/100ths) grains of explosive compounds, the sale and use of which shall be permitted at all times.

License Fees

Sec. 5. A. A license fee of $500.00 per year, due and payable on or before February 1st of each and every year beginning February 1, 1958, to the State Fire Marshal subject to the provisions of Section 12 of this Act, will be charged for the permit to manufacture, possesses and sell fireworks. The manufacturer may manufacture, possess and sell items other than those enumerated in Section 2, but for sale and delivery only to states where other types of fireworks are legal but may not be sold or used in the State of Texas.

The same license fee will apply to and shall be paid by any and all out-of-state manufacturer offering goods for sale in the State of Texas, as a condition to their sale in Texas.

B. A similar license fee of $750.00 annually, due and payable on February 1st of each and every year, as provided in Section 5A above, will be charged all distributors who possess and sell the fireworks enumerated in Section 2.

The license fee provided herein shall be due and payable by all out-of-state distributors offering goods for sale within the State of Texas.

C. A license fee, due and payable as provided in Section 5A above, of $500.00 per year, will be charged all jobbers who possess and sell the fireworks enumerated in Section 2.

The license fee provided herein shall apply to and be payable by out-of-state jobbers as a condition for selling within the State of Texas.

D. An annual license fee of Two Dollars ($2.00) will be charged all retailers who possess and sell fireworks enumerated in Section 2, for which an annual retailer's license shall be issued effective until mid-

night of the following 31st day of January. No person, firm or corporation shall offer fireworks for sale to individuals at retail before the 24th day of June and after the 4th day of July, or the 15th day of December of each year and after midnight of the 1st day of January of the following year. As amended Acts 1963, 58th Leg., p. 1103, ch. 429, § 1.

Effective January 1, 1964.

E. An annual license fee, due and payable as provided in Section 5A above, of $100.00, shall be due and payable by each importer who possesses and sells the fireworks enumerated in Section 2 above to any persons, firms, corporation or association within the State of Texas.

F. An annual license fee of $10.00, due and payable as provided in Section 5D above, shall be due and payable by all salesmen who take orders for the sale of fireworks enumerated in Section 2 above and all salesmen are prohibited from taking orders from any firm, individual, corporation, association or partnership not licensed and each order for the sale of fireworks taken must reflect the license number of the purchaser. Furthermore, salesmen are prohibited from possessing any fireworks described in Section 2.

G. The license fees provided above shall be due and payable by each retailer annually and for each separate place of business maintained.

H. A license fee of $5.00 for each public display shall be paid at the time of obtaining the permit, as hereafter provided, being payable to and in the manner provided and prescribed in Section 5A.

I. No person, firm, corporation or association shall deliver fireworks for resale to any individual, firm, corporation or association unless consignee produces a license or evidence that consignee holds such a license.

J. No distributor, jobber or retailer shall purchase fireworks from a factory, distributor jobber, manufacturer or salesman without first requiring proof that the license required of each herein has been obtained. No license provided for hereinabove shall be transferable nor shall a jobber or salesman be permitted to operate under a license granted to a distributor.

K. For the violation of any of the provisions of this Act, the license granted shall be revoked by order of the State Fire Marshal evidenced by a written notice of revocation furnished directly to the licensee and a copy thereof filed in the county or counties in which the licensee does business. Said notice of revocation shall set out the grounds for revocation and any licensee aggrieved thereby may, within ten (10) days from receipt of said notice, appeal from the decision of revocation to the District Court of Travis County, Texas, in which case the trial to determine the justification for said revocation shall be a trial de novo.

Licenses not issued, when

Sec. 6. No license, as provided in Section 5, shall be issued for either a manufacturer, a distributor, a jobber or a retailer unless the place of manufacture, or in case of a distributor, a jobber or a retailer, the place of storage of said fireworks, shall meet the requirements and specifications recommended from time to time by the State Fire Marshal.

Storing, locating, or display of fireworks; safety measures

Sec. 7. Be it further enacted, the placing, storing, locating, or displaying of fireworks in any window where the sun may shine through glass on the fireworks so displayed or to permit the presence of lighted cigars, cigarette, or pipes within ten (10)

feet of where the fireworks are offered for sale, is hereby declared, unlawful and prohibited. Fireworks offered for retail sale must be protected from direct contact with the public at all times. Fireworks shall not be sold at retail or displayed to the public within any building or portion thereof or any vehicle which allows for entry any persons other than employees within such building or vehicle unless such fireworks are kept where they cannot be reached or handled by such persons. At all places where fireworks are stored or sold, there must be posted signs with the words "Fireworks—No Smoking" in letters not less than four (4) inches high. No fireworks are to be sold at retail at any location where paints, oils, or varnishes are kept for use or sale, unless such paints, oils and varnishes are kept in the original unbroken containers, nor where resin, turpentine, gasoline, or other inflammable substance which may generate inflammable vapor is used, stored, or sold, or where the licensing authority or any police, fire or regulatory body having direct supervision over the establishment shall determine that any condition exists which makes the sale of fireworks at such location unusually hazardous.

Sale to children under ten years of age, intoxicated or irresponsible persons; throwing from or into motor vehicle

Sec. 8. Be it further enacted, that it shall be unlawful to offer for retail sale or to sell any fireworks to children under the age of ten (10) years or to any intoxicated or irresponsible persons. It shall be unlawful to explode or ignite fireworks within six hundred (600) feet of any church, hospital, asylum, public school, or within one hundred (100) feet of where fireworks are stored, sold, or offered for sale. No person shall ignite or discharge any permissible articles of fireworks within or throw the same from

a motor vehicle while within, nor shall any person place or throw any ignited article of fireworks into or at such a motor vehicle.

Manufacturing, possessing or selling; permit

Sec. 9. Be it further enacted, that no person, firm, corporation or association, without securing a permit from the State Fire Marshal, shall manufacture, possess or sell any dangerous fireworks for any use or purpose, including agricultural purposes or wild life control. Before any dangerous fireworks may be manufactured, possessed, sold or used, a permit therefor specifying the uses to be made thereof must be secured from the State Fire Marshal. Any permittee, whether governmental agency or commercial manufacturer, which distributes or sells at wholesale or retail argricultural or wild life fireworks shall require good and sufficient proof of the lawful intended use of such fireworks by the purchaser. The purchaser shall be required to exhibit the permit obtained from the State Fire Marshal as a condition to such purchase; a true copy of such permit and records specifying the uses to be made shall be given to the purchaser and only thereafter shall the purchaser be permitted to use the fireworks in the manner designated in the permit. Each such permit shall be good only for the specific purposes stated therein and for the time designated therein and at the end thereof shall be surrendered to the State Fire Marshal. The State Fire Marshal shall be paid $1.00 for each such permit.

Class A fireworks; display, etc.; application for permit; surety bond

Sec. 10. Be it further enacted, that "Class A Fireworks," as used in this part, shall include the following:

Colored bomb shells over 15 inches in circumference or consisting of more than one break;

Detonating shells, also known as aerial bombs, over nine inches in circumference or consisting of more than one break;

Ground bombardments, also known as detonating reports, of all sizes which explode on the ground;

Such other fireworks which may be designated for such classification by the State Fire Marshal.

Any adult person or any firm, copartnership, corporation or association planning to make a public display of fireworks shall first make written application for a permit to the chief of the fire department or the chief fire prevention officer of the city or county in which the display is to be held, or to the State Fire Marshal, or to such authorized deputy as he may designate for such purpose if there be no chief of the fire department or chief fire prevention officer in the area, at least 24 hours in advance of the date of the proposed display.

It shall be the duty of the officer to whom the application for a permit is made to make an investigation as to whether such a display as proposed shall be of such a character and so located that it may be hazardous to property or dangerous to any person, and he shall in the exercise of reasonable discretion grant or deny the application, subject to such reasonable conditions, if any, as he may prescribe.

The applicant for such display permit shall at the time of application furnish proof that he carries compensation insurance for his employees as provided by the laws of this state, and he shall file with the officer to whom the application is made, a bond issued by an authorized surety company to be approved by such officer, conditioned upon the applicant's payment of all damages to persons or property which shall or

may result from or be caused by such public display of fireworks, or any negligence on the part of the applicant, or his or its agents, servants, employees, or subcontractors in the presentation thereof, or a certificate evidencing the carrying of appropriate public liability insurance issued by an insurance carrier authorized to transact business in this state for the benefit of the person named therein as assured, as evidence of ability to respond in damages in at least such amount, said policies to be similarly approved. If the permit is granted, the sale, possession, and use of fireworks for public display is lawful for that purpose only. No permit granted is transferable.

In the case of an applicant for a permit to display Class A fireworks, or a combination of Class A and Class B fireworks, the amount of such a surety bond shall not be less than Ten Thousand Dollars ($10,000.00), and the amount of such insurance shall be not less than Twenty Thousand Dollars ($20,000.00).

In the case of an application for a permit to display Class B fireworks exclusively, the amount of the surety bond shall be not less than One Thousand Dollars ($1,000.00), and the amount of the insurance shall be not less than Five Thousand Dollars ($5,000.00). Provided, that in lieu of filing a surety bond, an applicant for such a Class B permit may file a bond in the sum of at least One Thousand Dollars ($1,000.00) with at least two good and sufficient sureties, subject to like conditions and to the approval of the officer issuing the permit.

Every public display of fireworks which includes in whole or in part "Class A Fireworks" shall be handled or supervised by a competent and experienced pyrotechnic operator approved by the chief of the fire department or the chief fire prevention officer of the city or county in which the display is to be held, or by the State Fire Marshal or his authorized deputy

therefor, if there be no chief of the fire department or chief fire prevention officer in the area.

Public display of "Class B Fireworks" may be supervised or handled by any competent adult person approved by the officer issuing the permit.

The State Fire Marshal shall adopt reasonable rules and regulations not inconsistent with the provisions of this part, for the granting of permits for, and the presentation of, public displays of fireworks.

All public displays of fireworks shall be of such a character and so located, discharged, or fired as not to be hazardous or dangerous to persons or property.

Notwithstanding the provisions of this part, any adult person, or any firm, corporation, or copartnership may secure a general license for the public display of fireworks within the State of Texas, subject to the provisions of this part relative to the securing of local permits for displaying of fireworks in any city or county, excepting that in lieu of filing such bonds or certificate of public liability insurance as hereinabove provided in this part, a surety bond similarly conditioned in the amount of Twenty-five Thousand Dollars ($25,000.00) or a certificate evidencing public liability insurance in a like amount shall be filed with the State Fire Marshal, who shall have the authority to issue such licenses, subject to such reasonable rules and regulations, not inconsistent herewith, which he may adopt. A certificate evidencing such general license, when so obtained, shall be filed with the legislative body or officer granting a permit for the display of fireworks prior to the issuance thereof.

No permit shall be granted for the discharge of dangerous fireworks except in connection with public display of fireworks.

No person shall transport, convey or deliver any dangerous fireworks except for permittees making

delivery to any other permittees, or to locations of public displays of fireworks authorized hereunder or to distributors outside of this state.

For purposes of license the sale and/or possession of "Class A" and "Class B" fireworks only, as described herein, shall require a Distributor's permit.

Violations as misdemeanors; punishment

Sec. 11. Be it further enacted, that any individual, firm, partnership, or corporation that violates any provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than One Thousand Dollars ($1,000.00), or imprisoned for not more than one (1) year, or both, in the discretion of the court or jury.

License fees; disposition of proceeds

Sec. 12. Be it further enacted, that all moneys derived from the license fees provided in Section 5 of this Act shall be paid into the State Treasury by the State Fire Marshal for safe keeping and shall by the State Treasurer be placed in a separate fund to be made available in such amounts as may be appropriated by the Legislature for the use of the State Fire Marshal in the administration of this Act and upon requisition by the State Fire Marshal. All such moneys so paid into the State Treasury and thus appropriated may be used by the State Fire Marshal for salaries and expenses of all persons employed for the adminstration and enforcement of this Act including all necessary travel expenses of the State Fire Marshal, or any assistant or appointee, and the Attorney General or persons authorized to act for either, when performing duties hereunder.

On January 1st of each year the unused portion of said funds in said special account for the past fiscal

year shall be paid over and become a part of the general revenue fund.

Partial invalidity

Sec. 13. Be it further enacted, if any portion of this Act be held unconstitutional, such holding shall not invalidate the remainder thereof.

Repealer

Sec. 14. Be it further enacted, that any Acts, laws or parts of laws in conflict herewith are hereby repealed to the extent of the conflict. However, this Act shall not repeal or affect any town, city or municipal ordinance which prohibits the sale and use of fireworks within the town, city or municipal boundaries which is in effect before the effective date of this Act, or that may be enacted after the effective date of this Act. Provided, however, that nothing herein shall be construed to limit or restrict the powers of cities, towns, or villages as defined and delegated by Title 28, Revised Civil Statutes of Texas, to enact ordinances prohibiting or imposing further regulations on fireworks; and provided, however, that any ordinance or ordinances heretofore enacted by any city under the authority of the above mentioned Title shall remain in full force and effect until thereafter amended by such city.

Effective date

Sec. 15. Be it further enacted, that this Act shall be and become effective on February 1st next from and after the passage of this Act, and any and all fireworks other than those defined in Section 2 above in the possession of any manufacturer, distributor, jobber, or retailer for use in the State of Texas from and after the effective date of this Act shall be con-

sidered as a violation hereof and such persons, firms, corporations or associations shall be subject to the penalties herein provided.

Emergency Clause

Sec. 16. The fact that there exists no adequate or effective regulatory laws governing the manufacture, sale and use of fireworks in the State of Texas, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended; and said Rule is hereby suspended, and this Act shall take effect and be in force as of the date specified in Section 15 above, and be it so enacted.